



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY

NEW YORK, NY 10007-1866

JUN 12 2018

Mr. Mark Klotz, P.E., Director
Division of Water
New York State Department of Environmental Conservation
625 Broadway, 4th Floor
Albany, New York 12233-3500

Dear Mr. Klotz:

The New York State Department of Environmental Conservation (NYSDEC) published its Notice of Proposed Rulemaking to amend 6 NYCRR Parts 700, 703 and 890 (Beach Act Standards and Reclassification Rule) on March 21, 2018. The following are the United States Environmental Protection Agency's comments and questions on NYSDEC's proposed Beach Act Standards and Reclassification Rule:

- 1) NYSDEC is proposing to add new limitations to the applicability of water quality criteria for total and fecal coliforms, enterococci and e. coli for coastal recreation waters and non-coastal recreation waters throughout the state (Section 703.4(e)). These proposed limitations revise the applicability of these criteria from year-round to only during a primary contact recreation season, defined in this proposed rulemaking as May 1st – October 31st. While the State is proposing to revise the applicability of the criteria for total and fecal coliforms, enterococci and e. coli, it is not proposing to modify or revise the current corresponding best usages or suitability requirements (use designations) for any of these waters. Therefore, the underlying designated use continues to be expressed as applicable year-round but with corresponding criteria proposed to apply only from May 1st – October 31st. EPA has the following questions regarding the proposed revision limiting the applicability of the total and fecal coliforms, enterococci and e. coli criteria to a primary contact recreation season:
 - a. EPA's regulatory requirements under 131.10(f) specifically says, "States may adopt seasonal uses as an alternative to reclassifying a waterbody or segment thereof to uses requiring less stringent water quality criteria. If seasonal uses are adopted, water quality criteria should be adjusted to reflect the seasonal uses, however, such criteria shall not preclude the attainment and maintenance of a more protective use in another season." Because NYSDEC's use designations for primary contact recreation continue to be expressed as applicable year-round, EPA is requesting that NYSDEC clarify the criteria applicable to protect the

primary contact recreation use for each of these water classes during the non-recreation season. If the state does not intend to protect the primary contact recreation use during the non-recreation season, EPA asks NYSDEC to clarify the use it intends to protect during the non-recreation season.

- b. NYSDEC is also proposing to add language stating, "In any other instance where the Department determines it is necessary to protect human health" to section 703.4(e). EPA is unclear how NY intends to use this language and asks for clarification.
 - c. Both Class SA and Class SB waters are classified by NYSDEC to include best usages of primary and secondary contact recreation. Please explain why NYSDEC is proposing to limit the applicability of the criteria for Class SB waters as applicable only during the recreation season whereas the same criteria for Class SA waters apply year-round.
 - d. In the proposed definition of "primary contact recreation season," NYSDEC limits the ability for it to expand the primary contact recreation season "in order to protect the best usages." Please explain why NYSDEC does not provide the ability for it to expand the primary contact recreation season to protect the suitability of the waters for primary contact recreation?
 - e. Finally, we are requesting that NYSDEC explain its rationale for proposing to define the primary contact recreation season as May 1st-October 31st including why this period is appropriate statewide.
- 2) With regard to the proposed adoption of EPA's recommended 2012 Recreational Water Quality Criteria (2012 RWQC), EPA asks why the State is proposing the 2012 RWQC for a subset of primary contact recreation waters (coastal recreation waters), and not for all primary contact recreation waters statewide.
 - 3) NYSDEC is also proposing to reclassify the upper and lower New York Bay segments from Class I to Class SB. In the Regulatory Impact Statement NYSDEC states:

"In 2015, the Department revised its regulations to require that Class SD and I waters be of quality suitable for swimming. That rulemaking did not designate a best usage of primary contact recreation for Class SD or I waters. Considering the water quality improvements in these two waterbodies and that they are adjacent to numerous public beaches, the Department has determined that they should be reclassified from Class I to Class SB to designate the best usage of primary contact recreation."

However, NYSDEC, in its Response to Comment #54 on the proposed rulemaking revising water quality standards for Class SD and I waters, NYSDEC states the following:

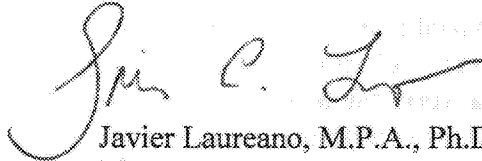
“DEC is required to complete formal rulemaking if and when it proposes new water quality standards rules, including EPA’s 2012 RWQC. The current rulemaking is not related to the 2012 RWQC.

EPA promulgated “Water Quality Standards for Coastal and Great Lakes Recreation Waters; Final Rule” Vol. 69, No. 220 / Tuesday, November 16, 2004, pp. 67218-67243 (69 FR 67218) (“2004 federal BEACH Act Rule”). The BEACH Act also added section 502(21)(A) to the CWA, which defines “coastal recreation waters” as “(i) the Great Lakes; and (ii) marine coastal waters (including coastal estuaries) **that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities.**” Section 502(21)(B) explicitly excludes “inland waters; or “waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea” from the definition of coastal recreation waters. **The 2004 federal Beach Act Rule applies to all coastal recreation waters in New York State that have either a best use or a suitability requirement for primary contact recreation. With the adoption of DEC’s rulemaking, the quality of all Class I and Class SD waters must be suitable for primary contact recreation. At that time, certain waters of New York will newly meet the definition for “coastal recreation waters.” These are the Class I waters of Lower New York Bay, and Upper New York Bay, south of the southern tip of Manhattan (The Battery).** Based upon information available to the Department (City-Wide Long Term CSO Control Planning Project East River and Open Waters Water body/Watershed Facility Plan Report Draft June 2007), DEC concludes that the EPA 2004 federal BEACH Act Rule enterococcus standards would be met in these waters; thus there would be no regulatory impact from the applicability of the federal standards to these waters, and no need to revise the regulatory impact statement.”

EPA is requesting that NYSDEC explain why these two waters are being re-classified to Class SB where, as of the adoption of the 2015 rulemaking (adding the suitability requirement for primary contact recreation to these waters), NYSDEC points out, these marine coastal waters are “designated” under 303(c) by NY State for “use” for swimming, bathing, surfing or similar water contact activities?

EPA Region 2 looks forward to continuing to work with NYSDEC to further improve New York State's WQS, in particular, water quality criteria that protect those who engage in primary contact recreation in NY state waters. If you have any questions, please call me at (212) 637-4125 or have your staff contact Alyssa Arcaya, Chief, Clean Water Regulatory Branch at (212) 637-3730.

Sincerely,



Javier Laureano, M.P.A., Ph.D.
Director
Clean Water Division